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No. 03-147 AND 03-431

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P., AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with this Court's *Chevron* principles, the Court of Appeals for the District of Columbia Circuit properly affirmed orders of the Federal Energy Regulatory Commission which ruled that: (1) certain offshore natural gas facilities are "gathering" facilities exempt from the Commission's jurisdiction under section 1(b) of the Natural Gas Act ("NGA"); and (2) such NGA-exempt facilities are not subject to the abandonment requirements of NGA section 7(b).

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the rules of this Court, Respondents Williams Gas Processing-Gulf Coast Company, L.P. ("WGP") and Transcontinental Gas Pipe Line Corporation ("Transco") state that:

The parent companies and any publicly-held company that have a 10% or greater ownership interest in WGP are:

The Williams Companies, Inc.
Williams Energy Services, LLC
Williams Field Services Group, Inc.
Williams Field Services Company
WGP Enterprises, Inc.

The parent companies and any publicly-held company that have a 10% or greater ownership interest in Transco are:

The Williams Companies, Inc.
Williams Gas Pipeline Company, LLC

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BRIEF OF RESPONDENTS WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P., AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

Respondents Williams Gas Processing-Gulf Coast Company, L.P. ("WGP") and Transcontinental Gas Pipe Line Corporation ("Transco") respectfully request that this Court deny the above-captioned petitions for writs of certiorari,

which seek review of *Williams Gas Processing–Gulf Coast Co., L.P. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) ("*Williams*"). Transco is a natural gas pipeline engaged in the transportation of natural gas subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or the "Commission") under the Natural Gas Act ("NGA"). 15 U.S.C. § 717, *et seq.* WGP is an affiliate of Transco that owns and operates NGA-exempt "gathering" facilities located primarily on the Outer Continental Shelf ("OCS") of the Gulf of Mexico. In *Williams*, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") upheld FERC orders ruling that certain of Transco's OCS pipeline facilities are NGA-exempt "gathering" facilities which Transco is authorized to transfer to WGP. Petitioners assert that the orders affirmed in *Williams* reflect an impermissible interpretation of the NGA's gathering exemption and abandonment requirements. WGP and Transco respectfully submit that the D.C. Circuit, in affirming FERC's orders, properly applied the two-step analysis prescribed by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defens. Council*, 467 U.S. 837 (1984). Accordingly, review by this Court is unwarranted.

SUMMARY

The instant petitions present essentially the same issues raised by virtually the same Petitioners in recently seeking review of *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002).[1] This Court denied those earlier

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[1] The Producer Coalition characterized its *Williams* petition (at 2) in Case No. 03-147, filed July 25, 2003, as a "follow along petition" to the earlier petitions of *ExxonMobil* filed in *The Producer Coalition v. FERC*, Case No. 02-1215, and *ExxonMobil Gas Marketing Co. v. FERC*, Case No. 02-1265. Shell Offshore Inc., *et al.*, in their petition in Case No. 03-431 (at 1), filed September 15, 2003, note the "close relationship" between the *Williams* and *ExxonMobil* decisions and the "[s]ubstantially similar issues presented." ("Petition No. 03-431")

petitions on October 6, 2003, and denial is appropriate again here. Indeed, Petitioners had requested "in tandem" consideration of the *ExxonMobil* and *Williams* petitions "because they involve the same issues and the *Williams* decision below relies heavily on *ExxonMobil*."[2] Moreover, shortly after *Williams* was decided, certain of the *ExxonMobil* Petitioners filed a Supplemental Brief addressing the issues presented by *Williams* as support for review of *ExxonMobil*.[3] Thus, this Court has already seen and rejected the Petitioners' arguments for review based on *Williams*.

Denial of review again is supported by a number of factors. First, as noted in FERC's Supplemental Brief opposing the *ExxonMobil* petitions, FERC has recently initiated a comprehensive review of the OCS jurisdictional test and abandonment policy applied in *Williams*. *See Notice of Public Conference, Application of the Primary Function Test on the Outer Continental Shelf*, Docket No. AD03-13-000 (August 14, 2003). (App. 1a). As part of that process, FERC has asked for suggestions from interested persons on developing a new test for gathering on the OCS. *Id.* at 9a. WGP and Transco (through their parent The Williams Companies, Inc.), as well as each of the Petitioners, filed comments proposing significant changes to the Commission's current OCS jurisdictional test and policies. These complex, fact-oriented jurisdictional issues are best addressed in the first instance by the FERC.

Second, the central concern that Petitioners allege in support of review, *i.e.*, that FERC's relinquishment of NGA jurisdiction will subject OCS shippers to the unconstrained

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[2] Petitioners' Joint Motion to Defer Consideration of Petitions for Writ of Certiorari to Subsequent Conference, at 3-4, filed Sept. 12, 2003 in Case Nos. 02-1215 and 02-1265.

[3] Supplemental Brief of ExxonMobil Gas Marketing Co., *et al.*, filed June 23, 2003 in Case No. 02-1265.

monopoly power of OCS pipelines, is simply incorrect. Petitioners disregard the fact that Congress enacted the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.*, to guarantee shippers open and nondiscriminatory access to all OCS pipelines, including NGA-exempt gathering lines. Moreover, many OCS pipelines, some owned by Petitioners, have never been regulated under the NGA.

Finally, Petitioners' jurisdictional theories would jettison the legal basis that has governed more than fifty years of natural gas industry regulation, including the past two decades of industry restructuring that has increased competition and market access through the "unbundling" of natural gas sales, transportation, and gathering services.

STATUTES INVOLVED

In addition to the statutes attached to the petitions, this case involves various provisions of the OCSLA, which are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

This case concerns applications filed by Transco to transfer (*i.e.*, "spindown") certain OCS pipeline facilities to WGP, and WGP's related requests that FERC confirm those facilities to be NGA-exempt "gathering." FERC approved the spindowns in part, finding that some of the subject facilities function as NGA-exempt gathering, but also denied in part, finding that other of the subject facilities function as jurisdictional transportation facilities.[4] Transco

[4] *See* Petition No. 03-431 at App. 21a-263a. Given FERC's denial of substantial portions of the requested relief (together with FERC orders in other pending proceedings also adversely impacting the spindowns), Transco/WGP's proposed spindowns have not yet been implemented, with the exception of the transfer of portions of the North Padre Gathering System. The remaining OCS facilities that were subject to the spindowns (*i.e.*, the Central Texas, North-High-Island/West-Cameron, and Central Louisiana gathering systems) continue to be owned by Transco.

and WGP appealed FERC's orders to the D.C. Circuit, claiming that FERC should have found that all of the subject facilities are NGA-exempt gathering, while Petitioners appealed to the D.C. Circuit claiming that none of the subject facilities constitute NGA-exempt gathering. In *Williams*, the D.C. Circuit denied all of the petitions and affirmed FERC's orders.

The spindown of NGA-exempt "gathering" by interstate pipelines is an outgrowth of congressional and regulatory enactments that restructured the natural gas industry. By way of background, since the NGA's inception in 1938, section 1(b) has stated that the NGA "shall not apply to . . . the production or gathering of natural gas." 15 U.S.C. § 717(b). Consistent with that statutory restriction, FERC never regulated gathering performed by "independent" gatherers, *i.e.*, those that do not also provide bundled NGA-jurisdictional services. In contrast, gathering and production activities performed by interstate pipelines were historically FERC-regulated because those activities were "bundled" with the pipelines' NGA-jurisdictional sales and transportation services.[5]

In the 1970s, the structure of the natural gas industry changed dramatically in response to the failure of gas price controls and resulting gas shortages. *See United Distr. Cos. v. FERC*, 88 F.3d 1105, 1123 (D.C. Cir. 1996). Those circumstances prompted Congress to enact measures to limit regulation and foster competition in the natural gas industry. For example, the Natural Gas Policy Act of 1978, 15 U.S.C.

Accordingly, FERC continues to exercise NGA rate jurisdiction over those facilities owned by Transco.

[5] Such authority was recognized by this Court in *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945) (NGA "does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company . . . for the purposes of determining the reasonableness of rates subject to its jurisdiction").

§ 3301, *et seq.*, required the phased deregulation of wellhead prices for certain categories of gas, and later the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989), phased out all remaining wellhead price controls. Following Congress' lead, FERC established a program of open-access and nondiscriminatory transportation, and later mandated the unbundling of gas sales and transportation. *Conoco Inc. v. FERC*, 90 F.3d 536, 539-40 (D.C. Cir. 1996). Congress saw the Commission's implementation of open-access transportation as "essential" to its decision to deregulate wellhead sales. *See United Distribution*, 88 F.3d at 1125.

This industry restructuring ended the interstate pipelines' decades-old role as merchants of "bundled" service (*i.e.*, purchasing, gathering, transporting, and reselling natural gas as a single service) and transformed them into open-access transporters. *See id.* at 1122-30. Absent their former merchant sales obligations, pipelines no longer needed to own extensive gathering systems to secure gas supplies (*see Conoco*, 90 F.3d at 539-41), and pipelines began "unbundling" their NGA-exempt gathering facilities from their NGA-regulated transportation facilities. To facilitate unbundling, FERC required pipelines to "'separately identify cost components attributable to transportation, storage, and gathering costs.'"[6] With gathering unbundled as a stand-alone service, various interstate pipelines transferred their gathering facilities to non-NGA-regulated companies that could compete on equal footing with non-NGA-regulated

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[6] *Policy Statement Providing Guidance with Respect to the Designing of Rates*, 47 FERC ¶ 61,295, at 62,059 (1989) (quoting regulations now codified at 18 C.F.R. § 284.10(c)). *See also Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates*, 65 FERC ¶ 61,136, at 61,690 (1993) ("The Commission has required gathering rates to be separately stated and unbundled from mainline transportation rates in a number of restructuring cases.").

independent gatherers, including a number of the Petitioners (or their affiliates). *See Conoco*, 90 F.3d at 541. While the unbundling of *onshore* gathering facilities has largely been completed with court approval,[7] pipelines such as Transco likewise have requested FERC jurisdictional determinations to unbundle *offshor*e gathering facilities.

In tandem with these pro-competitive restructuring initiatives, Congress amended and strengthened the OCSLA to ensure the expeditious and orderly development of OCS resources consistent with certain "competitive principles" to protect OCS shippers. *See* OCSLA Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978). Among other things, the OCSLA requires *all* OCS pipelines to "provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334(f)(1)(A).

REASONS FOR DENYING THE PETITIONS

A. FERC Has Initiated A Comprehensive Review Of The OCS Gathering Policy Applied In *Williams*.

On August 14, 2003, FERC issued a Notice of Public Conference "to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be." (App. 1a). *See also*, FERC's Supplemental Brief opposing the *ExxonMobil* Petitions denied in Case Nos. 02-1215 and 02-1265. FERC's Notice reviewed the history and evolution of its jurisdictional test for NGA-exempt gathering and expressed dissatisfaction with the reformulated primary function test applied in *ExxonMobil* and *Williams*. (App. 1a-9a). Thus, FERC scheduled, and ultimately convened, a public conference on

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[7] *See Conoco, supra; Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997); *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193 (D.C. Cir. 2000).

September 23, 2003 "to hear suggestions from interested persons on developing a new test for gathering on the OCS . . . [that would] provide incentives for investment in production, gathering, and transportation infrastructure offshore, without subjecting producers to the unregulated market power of third party transporters." (App.9a). FERC also invited the submission of written comments. (App.10a).

FERC's Notice listed four questions to be addressed, which questions encompass all of the issues presented herein by Petitioners:

> 1. To what extent should a gathering test that [sic] be based on the length and diameter of the pipeline, the extent the facilities are operationally integrated with either production or transportation facilities, the function of compression in relation to the facilities, and the proximity to the pipeline transportation grid?
>
> 2. To what extent should the location of processing plants, the central point of aggregation, the operating pressure of a line, and geographic configuration of facilities, be considered relevant in evaluating the status of facilities on the OCS? What are the advantages and disadvantages of relying on these factors? Are there any other factors that should be considered?
>
> 3. What should be the relevance of non physical factors such as a facility's history of regulation or the major business purpose of an owner?
>
> 4. If formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under section 7(b) of the Natural Gas [A]ct before the facilities may be transferred to another company?

(App. 9a-10a).

FERC developed an extensive record from a diverse group of market participants regarding these OCS jurisdictional and policy questions. FERC is now considering these issues with

the benefit of actual operating experience under the reformulated test applied by FERC in *ExxonMobil* and *Williams*, and with the benefit of broad industry input. Each of the Petitioners actively participated by presenting a representative at the public conference and/or through written comments (pre- and post-conference). Significantly, the Producer Coalition (Petitioners in Case No. 03-147) proposed that, for a one-year period after the adoption of a new jurisdictional test, "all cases decided since June 30, 1999 [*i.e.*, the date FERC adopted the reformulated test in *ExxonMobil*] that reclassified existing jurisdictional facilities to gathering should be open to review." *Post-Conference Comments of the Producer Coalition*, Docket No. AD03-13-000, at 3 (October 3, 2003). While FERC has not yet taken any formal action in response to the conference, it is appropriate that FERC in the first instance apply its expertise, with industry guidance, to these complex OCS jurisdictional and policy questions. Similarly, it makes little sense for this Court to devote its resources to reviewing the current jurisdictional test that is being reconsidered and likely revised. For these reasons, the Petitions should be denied.

B. There Is No Regulatory Gap With Respect To NGA-Exempt Gathering Lines On The OCS.

Petitioners argue that FERC's non-jurisdictional determinations affirmed in *Williams* will leave OCS shippers subject to the unconstrained market power of NGA-exempt pipelines. That assertion is untrue because the OCSLA protects all shippers on all OCS pipelines, including NGA-exempt gathering lines. Petitioners' claim is also misleading because about half of the OCS pipeline facilities have never been NGA regulated.[8]

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[8] *See Transcontinental Gas Pipe Line Corp.*, 97 FERC ¶ 61,298, at 62,400 (2001) ("While almost all NGA-regulated pipe is located in

When Congress amended the OCSLA in 1978 (at about the same time that it commenced decontrol of wellhead gas prices), it specifically rejected an amendment to extend NGA jurisdiction to all OCS gas pipelines. 124 Cong. Rec. 2092-93 (Feb. 2, 1978). Moreover, Congress recognized that "the Outer Continental Shelf is a vital national re[illegible]ce . . . which should be made available for expeditious and orderly development . . . in a manner which is consistent with the maintenance of *competition* and other national needs." 43 U.S.C. § 1332(3) (emphasis added). *See also* 43 U.S.C. § 1801(7) (finding that the OCS must be managed "to preserve and maintain competition"); 43 U.S.C. § 1802(2)(D) (a purpose of the Act is "to preserve and maintain free enterprise competition"); 43 U.S.C. § 1334(a) (requiring consultation with the Attorney General on "matters which may affect competition"); 43 U.S.C. § 1334(f) (mandating "competitive principles" to govern OCS pipeline operations).

Chief among those "competitive principles" was Congress' mandate that every OCS permit or other grant of authority require that the OCS pipeline "must provide open and non-discriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334 (f)(1)(A). Other sections of the OCSLA allow FERC in appropriate circumstances to allocate pipeline capacity in "proportionate amounts" (43 U.S.C. § 1334 (e)), order pipeline expansions (43 U.S.C. § 1334 (f)(1)(B)), and condition permits to ensure compliance with the OCSLA's "competitive principles." 43 U.S.C. § 1334 (f)(1). Violators of the OCSLA are subject to injunctions and civil and criminal penalties (43 U.S.C. § 1350), as well as citizens suits. 43 U.S.C. § 1349.[9] In short, Congress was well aware that its

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shallow water, approximately half of all the facilities found in shallow water are NGA-exempt production and gathering facilities.").

[9] In *The Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003), the court held that while FERC has certain specific grants of authority in OCSLA sections 1334 (e) and (f), it does not have general enforcement

OCSLA regulatory scheme would leave OCS "gathering" pipelines exempt from NGA rate regulation, but chose instead to regulate OCS pipelines by enhancing "competition" and providing comprehensive non-NGA mechanisms, described above, to prevent abuse in the marketplace.[10]

C. *Williams* Is Consistent With *Northern Natural* and Other Decisions Of This Court and The Circuits.

The decision below properly applied *Chevron's* two-step analysis in reviewing FERC's interpretation of the term "gathering" as used in NGA section 1(b). In that regard, no party disputes that, in the NGA, Congress has not "directly spoken to" the meaning of the term "gathering." *Chevron*, 467 U.S. at 842. Thus, the reviewing court's task is to determine "whether the agency's answer is based on a permissible construction of the statute" (*id.* at 843), and it must accord "deference" and "considerable weight" to the agency's construction. *Id.* at 844. Petitioners argue that FERC's interpretation of NGA section 1(b) conflicts with *Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84 (1963) and other decisions of this Court and the Circuits. Petitioners have misconstrued the applicable precedent.

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authority. The authority to administer and enforce the OCSLA is granted to other agencies, such as the Secretary of Interior, the Attorney General, and the Secretary of Energy. *See, e.g.*, 43 U.S.C. §§ 1331(b), 1334(a) (c) (e) (f) (g) (h) (i), 1349, 1350.

[10] Of course, a purported "regulatory gap" cannot support Commission jurisdiction over facilities that otherwise qualify as exempt "gathering." *ExxonMobil*, 297 F.3d at 1088 ("We emphatically agree that 'need for regulation cannot alone create authority to regulate'") (quoting *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 371 (5th Cir. 1997)); *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1412 (10th Cir. 1990) ("If, upon proper application of the primary function test, the facilities are indeed exempt from Commission jurisdiction, whatever 'attractive [regulatory] gap' results was clearly created by Congress.").

1. *Northern Natural* is a preemption case that concerned orders of the Kansas State Corporation Commission requiring pipelines to purchase gas "ratably" from all Kansas wells to which they are connected. *Id.* at 86. This Court rejected the argument that the NGA's "production or gathering" exemption allowed the state to dictate the manner in which sales are made in interstate markets. *Id.* at 89-93. The Court explained that "'production' and 'gathering' are terms narrowly confined to the *physical* acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Id.* at 90 (emphasis added). Thus, the holding of *Northern Natural* focused upon the "physical" basis for NGA-exempt gathering, as distinct from business activities such as gas sales conducted from the gathering facilities.[11]

Petitioners erroneously claim that *Williams* conflicts with *Northern Natural*. First, Petitioners argue that *Northern Natural* reflects a "bright line" dividing state and federal jurisdiction based on Congress' purported intent in the NGA to extend federal jurisdiction to the full extent of its authority under the Commerce Clause. Petition No. 03-431 at 16-17. However, *Northern Natural* says no such thing, and Petitioners cite nothing in *Northern Natural* to support their theory. More importantly, Petitioners' interpretation of *Northern Natural* is flatly contradicted by this Court's recognition that:

> When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. *It "**did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power**.*

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[11] *See also, Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, 681 (1954) ("[T]he 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas," but not to "the 'business' of production or gathering, with the sale of the product considered an integral part of such 'business.'").

> Rather it contemplated the exercise of federal power as specified in the Act." *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503 (1949). Indeed, Congress went so far in § 1(b) of the NGA, 15 U.S.C. § 717(b), as to prescribe not only "the intended reach of the [federal] power, but also [to] specif[y] the areas into which this power was not to extend." 337 U.S. at 503. Section 1(b). . . ***expressly reserv[ed] to the States the power to regulate, among other things "the production or gathering of natural gas . . . ."***

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 510 (1989) (emphasis added). *See also, Sea Robin*, 127 F.3d at 368 (5th Cir. 1997); *ExxonMobil*, 297 F.3d at 1076.

Petitioners further argue that *Williams* (and *ExxonMobil* on which it relies) conflict with *Northern Natural* because FERC failed to show that the facilities ruled to be gathering were confined to the "physical acts of drawing gas from the earth and preparing it for the first stages of distribution," nor that such facilities "relate . . . to established matters of 'local concern.'" Petition No. 03-431 at 19-20. To the contrary, FERC satisfied those standards by applying the physical criteria of its "primary function" test to distinguish NGA-exempt gathering from NGA-jurisdictional transmission.

For over fifty years, the Commission has relied on pertinent physical criteria to distinguish exempt gathering from jurisdictional transportation, and since 1983 those criteria have been embodied in the Commission's "primary function" test. *ExxonMobil*, 297 F.3d at 1077. The primary function test considers: (1) length and diameter of the pipeline; (2) extension of the facility beyond the central point in the field; (3) geographic configuration of the facility; (4) location of compressors and processing plants; (5) location of wells along all or part of the facility; and (6) operating pressure of the lines. *Id.* The oldest of

those criteria is factor (4), referred to as the "behind-the-plant test," dating back to the landmark decision in *Phillips, supra* (reversing Commission decision to exempt gas sales from NGA jurisdiction, but leaving intact the exemption of gas processing plants and the upstream facilities delivering gas to them). In its order underlying *Phillips*, the Commission explained the rationale for the behind-the-plant test, stating:

> [W]e find the movement of gas by Phillips to those [processing] plants to constitute gathering within the meaning of section 1(b). In each instance, the gas is collected to a common point in or relatively near the plant *where processing occurs to make the gas salable* or to recover extractable products or both.

Phillips Petroleum Co., 10 FPC 246, 277 (1951) (emphasis added).

The physical factors of the Commission's primary function test are fully consistent with the Court's recognition in *Northern Natural* that gathering involves "preparing [the gas] for the first stages of distribution." 372 U.S. at 90. As noted by the passage above, prior to processing (to remove extractable products and impurities), the gas is not salable, consumable, or fungible, and therefore is not ready for the "first stages of distribution."[12] Thus, the "distribution" of gas cannot begin until the collection process (including gathering and processing) has been completed. For more that 50 years,

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[12] Despite Petitioners' repeated references to "consumer protection" concerns, the raw, unprocessed gas moved by OCS gathering pipelines is not suitable for sale to consumer markets and indeed no such consumer markets exist on the OCS. Rather, in the restructured natural gas industry, gas prices are set by competitive forces at market "hubs" located well downstream of the production fields and well upstream of the consumers, with participants in the field-area operations (including producers and gatherers) allocating their respective shares of these downstream market-set prices on a "netback" basis. *See Shell Gas Pipeline Co.*, 78 FERC ¶ 61,192, at 61,828-29 (1997) (Santa, Comm'r dissenting).

the Commission has applied its primary function and behind-the-plant tests in scores of cases to identify NGA-exempt gathering both onshore and offshore.

2. While Petitioners focus their anguish on FERC's use of the "central aggregation" factor in reformulating the primary function test in *ExxonMobil* and *Williams*, Petitioners cry largely "crocodile tears." That is because the central aggregation factor was added by FERC to *restrict* the scope of facilities qualifying as NGA-exempt gathering. Specifically, FERC determined that "the 'behind-the-plant' test is not determinative of the gathering question offshore, and that instead it would look at the offshore system's configuration to locate a central point where gas is aggregated for transportation onshore." *Williams*, 331 F.3d at 1014. Thus, FERC used the central aggregation factor in the orders underlying *ExxonMobil* and *Williams* to establish jurisdictional demarcation points well *upstream* of the onshore processing plants, thereby denying the requests of Sea Robin and Transco for nonjurisdictional treatment for *all* facilities upstream of (*i.e.*, "behind") the processing plants. *Id. See also, Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,118, at 61,458-60 (2001); *Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,246, at 61,976-77 (2001).

The Petitioners' position that the offshore production platforms should serve as the jurisdictional demarcation, which would have resulted in the entirety of Transco's and Sea Robin's OCS facilities being classified as NGA-jurisdictional transportation, has been consistently rejected by the courts. *See EP Operating Co. v. FERC*, 876 F.2d 46, 49 (5th Cir. 1989) (reversing FERC's assertion of jurisdiction over the entirety of an OCS gathering system and rejecting FERC's finding that "the floating [production] platform would be the central point in the field."); *ExxonMobil*, 297 F.3d at 1085 ("This same decision [*EP Operating*] weighs against FERC's treating the production platforms as central

aggregation points as well."); *Sea Robin*, 127 F.3d at 367 (vacating and remanding FERC's assertion of jurisdiction over the entirety of Sea Robin's OCS system which has its upstream termini at the OCS production platforms). The Petitioners' jurisdictional test has never been upheld by a court, and its adoption would overturn more than 50 years of established precedent regarding the primary function test.

The cases cited by Petitioners fail to support their position. For example, *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), and *Hughes Brothers Timber Co. v. Minnesota*, 272 U.S. 469 (1926), concerned the lawfulness under the Commerce Clause of certain state taxes, which turned on determining where the local activity of gathering ceased and interstate commerce commenced. However, as discussed above, in exempting production and gathering from the NGA, Congress "'did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act.'" *Northwest Central*, 489 U.S. at 510 (quoting *Panhandle*, 337 U.S. at 502-503). Thus, the scope of NGA-exempt gathering is not limited by the full constitutional breadth of interstate commerce. In any event, in *Michigan-Wisconsin*, the tax was levied on "the taking of gas from the outlet of an independent gasoline plant" (347 U.S. at 161), which the Court found unlawful because "the State has delayed the incidence of the tax beyond the step where ***production and processing have ceased*** and transmission in interstate commerce has begun." *Id.* at 167 (emphasis added). Thus, *Michigan-Wisconsin* is fully consistent with the "behind-the-plant" test for gathering, under which NGA-exempt gathering continues until after processing of the gas has been completed.[13]

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[13] The other cases relied on by Petitioners (Petition No. 03-431 at 15-18) are likewise readily distinguishable as cases turning on the express grant of power in the NGA over sales for resale. *Exxon Corp. v.*

3. Finally, the erroneous nature of Petitioners' restrictive interpretation of NGA section 1(b) is further demonstrated by the fact that gathering commonly occurs in very large pipeline networks that extend *across state borders* and undeniably operate in interstate commerce. In fact, the gathering systems involved in *Phillips* consisted of "nine such networks of pipelines" of which "five are located entirely in Texas, one in Oklahoma, one in New Mexico, and *two extend into both Texas and Oklahoma*." *Phillips*, 347 U.S. at 675 (emphasis added). In this regard, "the fact that the subject pipeline facility crosses . . . state borders neither affects the NGA Section 1(b) [gathering] exemption nor precludes classification of the facilities in question as gathering." *Sid Richardson Energy Servs., Ltd.*, 104 FERC ¶ 61,024, at P 12 (2003). *See also*, *Columbia Gas Transmission Corp.*, 85 FERC ¶ 61,191, at 61,769 (1998); *Columbia Gas Transmission Corp.*, 79 FERC ¶ 61,045, at 61,7211, n.22 (1997); *The Superior Oil Co.*, 13 FERC ¶ 61,218, at 61,497 (1980).[14]

Eagerton, 462 U.S. 176, 184 (1983) merely recognized that the NGA preempted state regulation of "wholesale sales of natural gas in interstate commerce," but says nothing regarding the scope of NGA-exempt gathering. Similarly, *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 691-93 (1947) ruled that *sales for resale in interstate commerce* are not exempted from federal jurisdiction by the gathering and production exemption, and *Phillips, supra*, 347 U.S. at 684-85, held that the FPC (predecessor to FERC), has authority to regulate rates for such *sales for resale in interstate commerce* made by an independent gathering company.

[14] Likewise, a number of Circuit decisions have recognized that NGA-exempt gathering can occur in large pipeline systems operating in interstate commerce. *See e.g.*, *Pacific Gas & Electric*, 106 F.3d at 1193 (affirming the Commission's relinquishment of NGA jurisdiction over twenty-nine gathering facilities in New Mexico, Colorado, Oklahoma, and Texas); *Northwest Pipeline*, 905 F.2d at 1404 (overturning FERC's assertion of jurisdiction over six gathering facilities in Colorado and Utah); *Conoco*, 90 F.3d at 541-50 (affirming FERC's relinquishment of jurisdiction over gathering facilities located at 105 sites in Arkansas,

D. NGA Abandonment Requirements Do Not Apply To NGA-Exempt Gathering Facilities.

Petitioners erroneously claim that FERC was required to conduct a public-interest "abandonment" analysis under NGA section 7(b) with respect to facilities found to be NGA-exempt gathering. In *Panhandle*, 337 U.S. at 509, this Court, relying on the plain words of the statute, held that the abandonment requirements of NGA section 7(b) apply only to "facilities subject to the jurisdiction of the Commission," and not to "gathering" facilities exempt from the NGA under section 1(b). The Court there rejected arguments of the Federal Power Commission (now FERC) that otherwise exempt production or gathering facilities would be subject to section 7(b):

> The argument here is that since natural gas is the "lifeblood" of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. *The section, like those above, covers only "facilities subject to the jurisdiction of the Commission."*
>
> *To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act . . . .*

Id. at 509 (footnotes omitted) (emphasis added).[15]

Louisiana, Oklahoma, and Texas); and *Lomak*, 206 F.3d at 1195-98 (affirming FERC's relinquishment of jurisdiction over a gathering system located in New York and Pennsylvania).

[15] The abandonment cases cited by Petitioner (Petition No. 03-431 at 25-27) are off point. because they involved the abandonment of *NGA*-

Nor are Petitioners correct in claiming that there is a genuine split in the Circuits on the abandonment issue. In *Williams*, consistent with this Court's precedent cited above, the D.C. Circuit held that "section 7(b) only applies to jurisdictional facilities, and 'do[es] not expand [FERC's] section 1(b) jurisdiction.'" *Williams*, 331 F.3d at 1022 (quoting *ExxonMobil*, 297 F.3d at 1088 (quoting *Conoco*, 90 F.3d at 553)). While apparently unconvinced of any conflict, the D.C. Circuit further stated (*id.*) that "[w]e part company with the Fifth Circuit's opinion in *Pacific Gas & Electric*, 106 F.3d 1190, ***to the extent that*** it holds that FERC has discretion to examine whether abandonment [of exempt gathering facilities] would be in the public interest" (emphasis added). However, the Fifth Circuit was not called on to decide that same abandonment issue. That issue was not presented in *Pacific Gas & Electric* because the pipeline there sought abandonment authority from FERC (albeit unnecessarily), FERC nonetheless granted the abandonment, and the Fifth Circuit ruled that any need to address the public convenience and necessity had been satisfied. *Pacific Gas & Electric*, 106 F.3d at 1197.

The issue presented in *Pacific Gas & Electric* was "whether the Natural Gas Act supplies [FERC] with jurisdiction over [NGA-exempt] gathering facilities operated by a corporation that is wholly-owned by an [NGA-jurisdictional] interstate natural gas pipeline company." *Id.* at 1193. Regarding that jurisdictional issue, the Fifth Circuit *followed the D.C. Circuit's lead*, citing the D.C. Circuit's decision in *Conoco*:

> [T]he *Conoco* court is correct . . . The statute itself states that it does not apply to *gathering* activities.
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> * * *

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jurisdictional sales or transportation services. Thus, those cases do not support the applicability of NGA abandonment requirements to the *NGA-exempt* gathering *facilities* at issue in *Williams*.

> In sum, *we choose to follow the D.C. Circuit's lead* and hold that FERC construed the Natural Gas Act reasonably when it determined that *gatherers are outside of its statutory jurisdiction* even if they are wholly-owned subsidiaries of interstate pipeline companies.

Id. at 1196-97 (emphasis added). The Fifth Circuit's further statements which Petitioners' attempt to portray as a potential conflict (Petition No. 03-431 at 26-27) were merely *dicta*, addressing FERC's response to an argument raised by other parties and, more specifically, what "FERC's response to this argument *curiously suggests*," *i.e.*, a lack of power in the context of abandoning to a "*nonjurisdictional entity*." *Pacific Gas Electric, 106 F.3d at 1197.* (emphasis added). Moreover, the Fifth Circuit found that "*any* error" on FERC's part regarding abandonment authority "was inconsequential." *Id.* Accordingly, as to the jurisdictional issue presented in *Pacific Gas & Electric*, the Fifth Circuit followed the D.C. Circuit, and the Fifth Circuit's further statements in *dicta* present no genuine conflict that would warrant this Court's review.

CONCLUSION

Wherefore, Respondents WGP and Transco respectfully submit that the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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